April 29, 1872 Supr Court

Submitted on Merits

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 937.

SELUCIUS GARFIELDE, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED FEBRUARY 29, 1876.

Returned with a mandate

Supr Court

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1 United States Court of Claims.

SELUCIUS GARFIELDE
vs.
THE UNITED STATES OF AMERICA. } Petition. No. 9906. Filed November 3, 1874.—J. R.

The petition of Selucius Garfielde, a native-born citizen of the United States, whose present post-office address is Washington, D. C., respectfully showeth:

1st. That in conformity to the 243d section of the act of Congress entitled "An act to revise, consolidate, and amend the statutes relating to the Post-Office Department," passed on the 8th day of June, 1872, the Postmaster-General of the United States, on the 1st day of October, 1873, published an advertisement inviting proposals for carrying the United States mail upon certain mail-routes therein named, from July 1, 1874, to June 30, 1878, among which was the route from Portland, Oregon, by the way of Port Townsend, Washington Territory, to Sitka, Alaska, numbered in said advertisement 43132. The mail to be carried on said route in safe and suitable steamboats.

2d. That said advertisement invited proposals for monthly service on said route, to begin at Portland, Oregon, and run an estimated distance of 1,400 miles to Sitka, and back, or to commence at Port Townsend, Washington Territory, 500 miles less, and run to Sitka and back.

3d. That prior and up to the time of publishing said advertisement, it had been the uniform and invariable custom of the Post-Office Department, in cases where either of two starting-points upon a given mail-route could be accepted without detriment to the mail-service, to invite proposals to start from either place, and publish but one schedule of arrivals and departures as applicable to both classes of service.

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4th. That under said advertisement, and in strict conformity to the terms thereof, and fully advised by the schedule therein published, your petitioner, on the 8th day of January, 1874, executed proposals for carrying the mail on said route, No. 43132, from Port Townsend aforesaid to Sitka, Alaska, for the said four years, at the annual compensation of twenty-six thousand dollars, ($26,000,) and forwarded the same to the Post-Office Department, where they were received, opened, and examined with the other proposals on the 2d day of March, 1874.

5th. That said proposals, guaranteed by two responsible citizens, sworn to by your petitioner, and certified to by the postmaster at Port Townsend, as provided in the 245th, 246th, and 247th sections of said act, were accompanied by the certified check of your petitioner, in favor of the Postmaster-General, drawn upon the Vermont National Bank of St. Albans, then and still a solvent national bank, for the sum of one thousand seven hundred and forty dollars, ($1,740,) in compliance with the 253d section of said act.

6th. That on the 2d day of March, 1874, the Postmaster-General accepted the said proposals of your petitioner.

7th. That thereupon Hon. J. H. Mitchell, United States Senator from Oregon, appearing as attorney or friend (your petitioner not being advised which) of James Otis, the only other bidder on said route, protested against said award for divers and sundry reasons, and demanded that the questions involved should be referred to the solicitor for the Post-Office Department for his opinion thereon.

8th. That after such reference, and upon due consideration, the said solicitor, on the 17th day of March, 1874, affirmed the award to your petitioner.

9th. That immediately thereafter, the said Mitchell, acting for the said Otis as aforesaid, demanded that the said opinion of said
3 solicitor should be reviewed by the Attorney-General. Upon a review of said opinion, the Attorney-General endorsed his approval thereon.

10th. That upon receipt of said approval the Postmaster-General caused to be mailed to your petitioner, then a resident of Port Townsend, the letter of acceptance hereinbefore referred to, which was received by your petitioner in due time.

11th. That soon thereafter, but the precise date your petitioner has no means of determining, the Attorney-General sent to the Post-Office Department for the papers in this case for review, and on the 22d day of April, 1874, reversed his own former opinion and that of the solicitor aforesaid.

12th. That on the 18th day of April, 1874, and immediately after the Attorney-General had sent for the papers to revise his opinion, the Postmaster-General caused to be transmitted to your petitioner a telegraphic dispatch averring that the award, made to him as aforesaid, was suspended.

13th. That on the 28th day of May, 1874, and without further notice to your petitioner, the Postmaster-General awarded the contract for carrying the mail on said route, No. 43132, for said four years, to wit, from July 1, 1874, to June 30, 1878, to James Otis, of the city of New York, at the annual compensation of thirty-four thousand eight hundred dollars, ($34,800,) and on the 30th day of the same month a formal contract was executed for such service.

14th. Your petitioner further avers that in the controversy herein set forth, and in the said award and contract to Otis, the said J. H. Mitchell and James Otis were acting as agents of one Ben. Holladay, of Portland, Oregon, who is performing the service under said contract, is the sole beneficiary thereof, and is receiving the entire compensation therefor, as your petitioner is informed will appear by the letters of said Holladay to the Post-Office Department, and by the assignment made upon the warrant drawn by the Postmaster-General, or the draft issued thereon, for compensation for the quarter ending September 30, 1874.

4 15th. That your petitioner is the sole and only owner of the claim herein set forth. That he has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government.

16th. That your petitioner, at great expense of time and money, came from Port Townsend aforesaid to this city, and on or about the 8th day of October, 1874, in person, demanded the fulfillment of the contract entered into with him as aforesaid, which was refused by said Postmaster-General.

17th. That your petitioner has at all times been ready and willing to perform said mail-service as aforesaid, and to do and perform all and everything required of him by his said proposals and contract, but has been prevented, as herein set forth.

18th. That, by reason of the premises, your petitioner has been damaged in the sum of ninety-two thousand dollars, ($92,000.)

19th. And for further cause of action your petitioner avers that, on the 2d day of March, 1874, the Postmaster-General of the United States entered into a contract with your petitioner to carry the United States mails on advertised route No. 43132, between Port Townsend, Washing-

ton Territory, and Sitka, Alaska, monthly, in steamboats, for the period of four years, from the 1st day of July, 1874, to the 30th day of June, 1878, at and for the annual compensation of twenty-six thousand dollars; and afterwards, to wit, on the 18th day of April, 1874, failed and refused to perform said contract; and thereafter, on the 28th day of May, 1874, and without any default on the part of your petitioner, entered into another contract with one James Otis for carrying the same mails over said route for said period of time, at the annual compensation of thirty-four thousand eight hundred dollars, and on the 1st day of July, 1874, caused the said mails to be delivered to said Otis for transportation, to the damage of your petitioner in the sum of ninety-two thousand dollars.

5 Wherefore your petitioner prays judgment of this honorable court in the sum of ninety-two thousand dollars, and for general relief.

EBON C. INGERSOLL,
Attorney for Petitioner.

Selucius Garfielde, claimant herein, makes oath and says that no assignment or transfer of the above claim, or any part thereof, or any interest therein, has been made; that he is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets, and that he believes the facts as stated in said petition are true.

SELUCIUS GARFIELDE.

Subscribed and sworn to before me this third day of November, A. D. 1874.

[SEAL.]

JOHN RANDOLPH,
Assistant Clerk Court of Claims.

Ebon C. Ingersoll is claimant's attorney, and his post-office address is Washington, D. C., and also that of petitioner's.

6 In the United States Court of Claims, December term, A. D. 1874.

SELUCIUS GARFIELDE
vs.
THE UNITED STATES. } No. 9906.

And the said defendants, by their Attorney-General, come and make answer to the petition of the claimant on file herein; and, not confessing the same, or any part thereof, do hereby most expressly deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of said petition as sets forth and avers that the United States are indebted to said claimant in the sum of ninety-two thousand dollars the defendants say that they are not indebted to said claimant in said sum of money, nor any part thereof.

And as to so much of said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against said Government, the said defendants deny the truth of said allegation, and call for proof thereof.

JOHN GOFORTH,
Assistant Attorney-General.

Filed January 27, 1875.

7 In the Court of Claims.

SELUCIUS GARFIELDE } 9906.
vs.
THE UNITED STATES. }

At a Court of Claims held at the Capitol, in the city of Washington, the 14th day of February, A. D. 1876, judgment was ordered to be entered up as follows:

The Court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the said claimant's petition be dismissed.

By the court.

8 In the United States Court of Claims.

SELUCIUS GARFIELDE } No. 9906.
vs.
THE UNITED STATES. }

To the honorable the Court of Claims:

The above-named petitioner, by Ingersoll and Rice, his attorneys, respectfully makes application for an appeal to the Supreme Court of the United States from the judgment of the said Court of Claims rendered in said cause against him on the 14th day of February, 1876.

And said petitioner respectfully prays for the requisite order allowing such appeal.

E. C. INGERSOLL AND
B. F. RICE,
Attys. for said Petitioner.

Filed February 15, 1876.

Ordered that the appeal be allowed as prayed for.

By the court.

9 Court of Claims.

SELUCIUS GARFIELDE } No. 9906.
vs.
THE UNITED STATES. }

FINDINGS OF FACT.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

1. In conformity to the two hundred and forty-third section of the act of Congress entitled "An act to revise, consolidate, and amend the statutes relating to the Post-Office Department," approved June 8, 1872, the Postmaster-General, on the 1st day of October, 1873, published an advertisement inviting proposals for carrying the mails upon certain routes therein named, from July 1, 1874, to June 30, 1878, among which was the route from Portland, (Oregon,) by the way of Port Townsend, (Washington Territory,) to Sitka, (Alaska,) numbered 43132, of which said advertisement so much as relates to said route was as follows:

"POST-OFFICE DEPARTMENT,
" *Washington, October* 1, 1873.

"Proposals will be received at the contract-office of this Department until 3 p. m. of February 2, 1874, (to be decided on or before March 2,

1874,) for conveying the mails of the United States in the * * * Territory of Washington, from July 1, 1874, to June 30, 1878, on the routes and by the schedule of departures and arrivals herein specified: * * *

"43132. From Portland, Oregon, by Port Townsend (W. T.) and San Juan, to Sitka, Alaska, 1,400 miles and back, once a month, in safe and suitable steamboats.

"Leave Portland on 1st of every month; arrive at Sitka by the 10th of every month.

"Leave Sitka on the 13th of every month; arrive at Portland by the 23d of every month.

"Proposals invited to begin at Port Townsend, (W. T.,) 500 miles less.

"Present pay, $34,800 per annum."

2. In response to said invitation for proposals there were two separate bidders and no more, each of whose proposals was received at the Post-Office Department in due time, and was accompanied by the guarantee of two responsible citizens, the oath of the bidder, certificate of a postmaster, and a check on a solvent bank for the deposit required, according to the law and regulations.

George K. Otis, one of said bidders, proposed to convey the mails with celerity, certainty, and security, from July 1, 1874, to June 30, 1878, on route No. 43132, from Portland, Oreg., by Port Townsend, W. T., and San Juan to Sitka, Alaska, 1,400 miles, and back, once a month, in safe and suitable steamboats, to leave and arrive at the times specified in said advertisement, for the annual compensation of $34,800. He made no "proposals to begin at Port Townsend, W. T., 500 miles less."

Selucius Garfielde, the claimant, the only other bidder, made the following proposal:

"The undersigned, Selucius Garfielde, whose post-office address is Port Townsend, county of Jefferson, Ter. of Washington, proposes to convey the mails of the United States from July 1, 1874, to June 30, 1878, on route No. 43132, between Port Townsend and Sitka, Alaska, under the advertisement of the Postmaster-General dated October 1, 1873, in safe and suitable steamboats, 'with celerity, certainty, and security,' (law of June 8, 1872,) for the annual sum of twenty-six thousand dollars.

"This proposal is made with full knowledge of the distance of the route, the weight of the mail to be carried, and all other particulars in reference to the route and service; and also after careful examination of the laws and instructions attached to advertisement of mail-service.

"Dated Port Townsend, W. T., Jan. 8, 1874.

"SELUCIUS GARFIELDE, *Bidder.*"

He made no proposal under the first part of the advertisement for carrying the mail between Portland, Oreg., by Port Townsend, W. T., and San Juan to Sitka, Alaska, twice a month, to leave and arrive as therein specified.

3. On the 19th of February, 1874, said Otis addressed to the Postmaster-General a protest against awarding the contract to said Garfielde on two grounds: "First. That the bid or proposal of said Selucius Garfielde did not meet the requirements of the two hundred and sixty-seventh of the regulations of the Department, which requires 'that bidders shall first propose for service strictly according to the advertisement, and then, if they desire, separately for different service; and if the regular bid be the lowest offered for the advertised service, the other

propositions may be considered.' Second. That Mr. Garfielde was a Federal officer, a collector of customs at Port Townsend, and could not therefore enter into such a contract with the United States." This protest was, on the 21st of February, 1874, referred by the Postmaster-General to the Assistant Attorney-General of the Post-Office Department for careful examination and his opinion in writing. On the 17th of March, 1874, the Assistant Attorney-General gave his written opinion that neither of the positions taken by Mr. Otis could be sustained, and said opinion was approved by the Attorney-General by his indorsement in the following words:

"DEPARTMENT OF JUSTICE,
"*April* 3, 1874.

"In so far as the foregoing opinion holds that the bid of Mr. Garfielde is not invalid on account of the advertisement, and that there is no law to prohibit the letting of the contract to him because he is collector of customs, I approve it; but as to the other matters therein, I express no opinion.

"GEO. H. WILLIAMS,
"*Atty. General.*"

4. Some time in March, 1874, the following notice of acceptance was sent to said Garfielde:

"U. S. POST-OFFICE DEPARTMENT,
"OFFICE OF THE SECOND ASSISTANT POSTMASTER-GENERAL,
"*Washington, D. C., March* 2, 1874.

"SIR: The Postmaster-General has accepted your proposal, under advertisement of October 1, 1873, for conveying the United States
11 mail, from July 1, 1874, to June 30, 1878, on (Washington Territory) route No. 43132, between Port Townsend and Sitka, Alaska, at $26,000 a year, 'with celerity, certainty, and security.'

"Contracts will be sent in due time to the postmaster at your place of residence, which you must execute and return to the Department by the 1st day of June; otherwise you will be considered a failing bidder, and the service will be relet at your expense.

"You will request the postmaster at the beginning and end of the route to inform this Office when you make the first trip.

"Respectfully, &c., &c.,

"J. L. ROUTT,
"*Second Assistant Postmaster-General.*

"Mr. SELUCIUS GARFIELDE,
"*Port Townsend, Jefferson Co., Washington Territory.*
"Recorded and sent March , 1874."

And on the 18th day of April, 1874, the following message was telegraphed to him:

"To SELUCIUS GARFIELDE,
"*Collector, Port Townsend, W. T.:*

"Acceptance of your proposal for mail service, Port Townsend to Sitka, is suspended. Attorney-General has called for the papers to revise his decision.

"JNO. L. ROUTT,
"*2d Assist. P. M. Gen'l.*"

5. On the 22d of April, 1874, the Attorney-General submitted to the Postmaster-General his written opinion, as reported in vol. 14, Opinions

of Attorneys-General, 389, wherein he held that the proposal of Mr. Garfielde, under the circumstances of the case was not entitled to be regarded as a bid after due advertisement made, such as would authorize a contract to be awarded thereon, for the reasons therein fully set forth.

6. On the 28th day of May, 1874, the proposal of said George K. Otis was duly accepted by the Postmaster-General, and on the 30th day of said month a contract in writing was made with him whereby he agreed to carry the mails, according to the terms of said advertisement, from Portland, (Oregon,) by Port Townsend and San Juan, to Sitka and back, at $34,800 per year, commencing July 1, 1874, and ending June 30, 1878; and the mails on said route are now carried under said contract.

7. On or about the 8th of October, 1874, the claimant in person demanded of the Postmaster-General the fulfillment of the contract which he claimed had been entered into with him as stated in his petition, and the Postmaster-General denied and refused to comply with his said demand.

8. The difference between the cost of carrying the mails as proposed by the claimant, (assuming that he was to carry them once a month and back, from Port Townsend to Sitka,) and the amount which he was, by said proposal, to receive therefor, making reasonable deduction for the less time engaged by him, and for release from the care, trouble, risk, and responsibility attending a full execution of the contract, would be fifteen thousand dollars per annum.

9. The form of advertisement in this case is in conformity to the usage of the Post-Office Department for many years past; the claimant
12 having proved 907 cases of similar advertisements previously published by the Postmaster-General.

10. Among the instructions and regulations issued by authority and official sanction of the Postmaster-General are the following, which were referred to and proved or admitted by the parties at the trial:

"SPECIAL NOTICE.—All instructions and regulations promulgated by the Postmaster-General, conformably to law, for the guidance of persons employed by the Department, are entitled to the same respect and obedience as acts of Congres." * *

"SEC. 263. The Postmaster-General may order an increase or extension of service on a route, by allowing therefor a pro-rata increase on the contract-pay. He may change schedules of departures and arrivals in all cases, and particularly to make them conform to connections with railroads, without increase of pay, provided the running-time be not abridged. He may also order an increase of speed, allowing, within the restrictions of the law, a pro-rata increase of pay for the additional stock or carriers, if any. The contractor may, however, in case of increase of speed, relinquish the contract, by giving prompt notice to the Department that he prefers doing to carrying the order into effect. The Postmaster-General may also discontinue or curtail the service, in whole or in part, in order to place on the route a greater degree of service, or whenever the public interests, in his judgment, shall require such discontinuance or curtailment for any other cause; he allowing, as a full indemnity to the contractor, one month's extra pay on the amount of service dispensed with, and a pro-rata compensation for the amount of service retained and continued."

"SEC. 267. Bidders should first propose for service strictly according to the advertisement, and then, if they desire, separately for different

service; and if the regular bid be the lowest offered for the advertised service, the other proposition may be considered."

"SEC. 275. The law provides that contracts for the transportation of the mail shall be awarded to the lowest bidder tendering sufficient guarantees for faithful performance, without other reference to the mode of such transportation than may be necessary to provide for the due celerity, certainty, and security thereof." * *

CONCLUSION OF LAW.

On the facts found by the court, the claimant is not entitled to recover, and his petition must be dismissed.

RICHARDSON, J., delivered the opinion of the court:

On the 1st day of October, 1873, the Postmaster-General published a notice and advertisement inviting proposals for carrying the United States mails, of which all that is material to the present case was as follows:

"POST-OFFICE DEPARTMENT,
"*Washington, October* 1, 1873.

"Proposals will be received at the contract office of this Department until 3 p. m. of February 2, 1874, (to be decided on or before March 2, 1874,) for conveying the mails of the United States in the * * * Territory of Washington, from July 1, 1874, to June 30, 1878, on the routes and by the schedule of departures and arrivals herein specified: * * *

13 "43132. From Portland, Oregon, by Port Townsend (W. T.) and San Juan, to Sitka, Alaska, 1,400 miles and back, once a month, in safe and suitable steamboats.

"Leave Portland on the of every month; arrive at Sitka by the 10th of every month.

"Leave Sitka on the 13th of every month; arrive at Portland by the 23d of every month.

"Proposals invited to begin at Port Townsend, (W. T.,) 500 miles less.

"Present pay, $34,800 per annum."

George K. Otis made a proposal to carry said mails from Portland, by Port Townsend and San Juan to Sitka, once a month, and back, according to the schedule of departures and arrivals specified in said advertisement, for the compensation of $34,800 per annum, but did not make a proposal to begin at Port Townsend.

Selucius Garfielde, the claimant, made a proposal under said advertisement, to carry the mails from Port Townsend to Sitka, on said route, No. 43132, for the annual compensation of $26,000, but did not specify the frequency of the service nor the times of departure and arrival.

The Postmaster-General accepted the proposal of the claimant, and gave him written notice accordingly. Subsequently, and before the time for making the formal written contract, he suspended his action thereon, and upon receiving the opinion of the Attorney-General that the proposal of Mr. Garfielde was not, "under the circumstances of the case, entitled to be regarded as a bid after due advertisement made, such as would authorize a contract to be awarded thereon," (14 Opin., 389,) he accepted the proposal of Mr. Otis and entered into a contract with him to carry the mails from Portland, by Port Townsend and San Juan, to Sitka, on said route, No. 43132, according to said advertisement, and refused to make any contract with the claimant, or to recognize any

as having been made by the acceptance of his proposal in the first instance.

The petitioner brings this action to recover damages for non-fulfillment, on the part of the defendants, of the contract which he maintains was made with him by the Postmaster-General, by the acceptance of his proposal. It has frequently been held that when a bid has thus been accepted and the bidder is ready, willing, and able to perform his part of the engagement, the other party, accepting the bid and refusing to enter into a formal, written contract, is liable to the same extent as he would have been had the contract been written out in full and signed by both parties. (Adams's Case, 1 Court of Claims R., 192; Mayer's Case, 5 C. C. R., 317; Taloe *vs.* Merchants' Fire Insurance Company, 9 How., 390.; Mactier's Admr. *vs.* Frith, 6 Wend., 103; Pratt *vs.* the Hudson River Railroad Company, 21 N. Y., (court of appeals,) 305.)

The defendants are therefore liable in this action if the Postmaster-General had authority under the law and regulations to accept, as he at first did, the claimant's bid. When once lawfully accepted the contract would become binding on both parties, and the action of the Postmaster-General afterward in refusing to acknowledge it, and to perform his engagements thereby made, would be wrongful, and the claimant would be entitled to damages. But if the Postmaster-General exceeded his authority and undertook to make a contract in violation of law, then his act in accepting the proposal of the claimant was void, and there is no binding obligation on the part of the defendants.

The question presented for our determination, and upon which the decision must turn, is whether or not the words in the advertisement,

14 "proposals invited to begin at Port Townsend, (W. T.,) 500 miles less," are a sufficient compliance with the statute to authorize a proposal for that service alone by the claimant and an acceptance by the Postmaster-General.

The act of Congress of June 8, 1872, section 243, (17 Stat. at Large, 313,) provided "that before making any contract for carrying the mail, other than those hereinafter excepted, the Postmaster-General shall give public notice by advertising once a week for six weeks in one or more, not exceeding five, newspapers published in the State or Territory where the service is to be performed, one of which shall be published at the seat of government of such State and Territory; and such notice shall describe the route, the time at which the mail is to be made up, the time at which it is to be delivered and the frequency of the service." * * (Revised Statutes, sec. 3941.) And then followed a provision in section 265 "that the Postmaster-General may enter into contracts for carrying the mail, with railway companies, without advertising for bids therefor." * * (Revised Statutes, sec. 3942.)

Under similar provisions applicable to all Departments of the Government, (Revised Statutes, sec. 3709,) this court has uniformly held all contracts void which were not made upon advertisements previously published. A compliance with the statute has been considered a condition-precedent, upon the performance of which only could a binding contract be made by the officers of the United States. The Government acts by its public officers, and their powers and duties are prescribed and limited by laws which they must strictly follow. These laws all parties dealing with public officers are bound to know, and in cases like this such parties have the means of determining for themselves how far the power of the officers extends, and if the latter attempt to bind the Government otherwise than as duly authorized, the United States are not

liable. (Childs *vs.* United States, 4 C. C. R., 176; Wentworth *vs* United States, 5 C. C. R., 302; United States *vs.* Speed, 8 Wall., 77.)

If an advertisement inviting proposals is a condition precedent to the making of a contract, so is a compliance with the terms of the advertisement when prescribed by law, and it must be proved.

The claimant contends that the advertisement in this case was for two routes, or the same as two separate advertisements, in response to which he was right in bidding upon one of them only. If that be so, then there was a serious defect in the notice which invited proposals for the second route from Port Townsend to Sitka, in that it did not describe the time at which the mail was to be made up, the time at which it was to be delivered, and the frequency of the service as required by statute. These are specified as to the main route from Portland set forth in the first part of the advertisement, but those specifications were not by direct reference made applicable to any service which was invited from Port Townsend, and in one important particular the two services would seem to require different specifications. The provision for the delivery of the mails once a month might apply equally well to both, but it cannot be supposed in this age, when Congress and the Post-Office Department are making such great effort and expending such a vast amount of money to secure swift transportation of newspapers, letters, and correspondence, that it was contemplated allowing the same time, ten days, for taking the mails 500 miles from Port Townsend as for taking them 1,400 miles from Portland to Sitka.

This defect in the advertisement the claimant did not attempt to cure in his proposal, by specifying the frequency of the service, and the times of departure and arrival of his conveyances, so that with both together those elements of a contract are left in doubt and uncertainty.

15 The number attached to the Portland route, "No. 43132," and the words "present pay, $34,800 per annum," together with the specifications for that route, being in exact compliance with the law, while for the other route there are no specifications whatever, show conclusively, we think, that but one route was intended to be offered for competition; to propose for which was, by the regulations, absolutely necessary in order to constitute one a "regular bidder."

Why, then, was the clause "proposals invited to begin at Port Townsend, (W. T.,) five hundred miles less," added? With the regulations of the Department before us, and in the light which they furnish, we think it is not difficult to determine for what purpose those words were inserted, and what are their force and effect. No. 267 of the regulations of the Department is as follows: "Bidders should first propose for service strictly according to the advertisement, and then, if they desire, separately for different service; and if the regular bid be the lowest offered for the advertised service, the other proposition may be considered."

The range of proposals for such "different service" is wholly unlimited by this regulation, and parties making bids might waste their time and incur useless trouble in proposing a great variety of service never desired or contemplated by the Department, and contrary to its well-settled policy or previous determination. To obviate this difficulty, and to direct bidders' minds to what "different service" the Postmaster-General would take into consideration, the clause was added to the advertised route, inviting proposals to begin at Port Townsend, merely as a suggestion to bidders, to be availed of under the two hundred and sixty-seventh regulation, in respect to such different service; and the frequency of the service and the times of departure and arrival were

purposely omitted, in order that bidders might make such proposals as to those particulars as they saw fit.

It was a convenient and useful suggestion directing the minds of bidders to the real wants and views of the Department, while not confining them within the narrow limits required by statute for the regular route. So, too, it was fair to all parties, conveying to them alike a knowledge of the kind of different service, which in the particular case had, perhaps, been contemplated, and which might prevent those who had otherwise obtained such information from gaining an advantage over others who had been less fortunate.

The fact that the form of the advertisement used in this case was in conformity to the long-established practice of the Department, and that 907 similar notices were found, confirms us in the opinion that a clause thus added, such as that now under consideration, must have been and was adopted on account of the rule which we have cited, and as a suggestion thereunder, for we cannot believe that successive Postmasters-General would regard it as a compliance with the law, which expressly required the frequency of the service and the times of departure and arrival to be specified. It is more reasonable to suppose that this practice of the Department originated and continued in operation through a series of years from a careful consideration of the regulations, than from a careless and loose execution of the express requirements of the statute.

The practice of the Post-Office Department in relation to the acceptance or rejection of bids under such advertisements was not proved, and we are not informed of the construction usually adopted by that Department in such cases.

These views dispose of the claimant's case. He bid only for the special, incidental, or "different service," suggested by the adver-
16 tisement, and as he did not first propose for service strictly according to the advertisement, his bid, by the regulations, could not be taken into consideration. The bid of Geo. K. Otis was the only regular bid "strictly according to the advertisement," and the contract was rightly awarded to him under the law and the regulations, which alike require that the award shall be made to the lowest bidder. The Postmaster-General having erred in accepting the bid of the claimant, had a right, and it was his duty, to correct his error. His act in accepting the claimant's bid was in violation of law, and of no force and effect, and the petitioner acquired no rights thereby.

The judgment of the court is that the petition be dismissed.

NOTT, J., dissenting:

It cannot be doubted at this day that the heads of the Executive Departments are something more than ministerial officers, nor that they are what the Supreme Court has termed "executive officers." (Decatur vs. Paulding, 14 Peters' R., 497.) It is also beyond dispute that the law and policy of the United States confide to the head of an Executive Department the construction of statutes relating to the business of his Department, and that the construction of such a statute is an executive and not a ministerial act, as to which the judiciary cannot revise his judgment by mandamus or interfere with his discretion. (Brown's Case, 6 C. Cls. R., p. 186.) It has, moreover, been determined by the Supreme Court that a "long standing construction," given to a statute by "the Department whose duty it was to act under it," followed by the implied recognition of Congress, will forestall the consideration that the judi-

ciary might give to "the construction of the statute were the matter res nova." (Mrs. Alexander's Case, 7 C. Cls. R., 205.)

The decision of the court in the case now before us goes, as I understand it, entirely upon the technical point that the advertisement for proposals for the mail-service from Port Townsend to Sitka did not literally and technically comply with the terms of the statute, and that the Postmaster-General erred in the construction which he and his assistants gave to the statute and to the advertisement when they awarded the contract to the claimant. But the claimant has produced a great number of advertisements from the files of the Post-Office, running back more than thirty years, which do not differ from the one before us in form or substance, and the defendants have failed to show that one of them was ever questioned by any person, or held insufficient by the Department. I, therefore, dissent from the implied proposition that the judiciary can revise the action of the head of an Executive Department in regard to the construction of a statute largely directory in its character, the administration whereof has been confided to his discretion. I also dissent from the secondary proposition, that the advertisement was absolutely void under the statute.

The object of the statute was to invite competition, and the object of the advertisement was to inform bidders of that as to which they might compete. It described a mail-service within specified times, and under certain conditions, to a designated place from either of two starting-points. In the body of the advertisement, Portland was designated as the place where the service should begin; in the second invitation, it was expressly stated that the service was "to begin at Port Townsend." What would have been gained by repeating the times and conditions over again, except a mass of words, I am unable to understand. It is possible that the Post-Office Department advertised for one thing and wanted another, but that has nothing to do with the certainty of the
17 advertisement. Neither can the terms of the contractor's proposal, nor a subsequent misunderstanding or disagreement as to the terms of the contract, affect this question. All that the statute intended the advertisement to accomplish was to invite competition for something, and that something was to be learned from its terms. If the contractor's proposal did not conform to the Department's construction of the advertisement; if he proposed for one thing when the Department meant another, the latter was at liberty to reject the bid. But when the contractor's bid conformed to the terms of the advertisement, and imposed no new conditions, and the Department advisedly accepted the bid as it stood, the only resulting question is, whether the advertisement sufficiently complied with the purpose of the statute in securing competition for the thing advertised. The advertisement itself answers that question. Every person desiring to compete could learn from it the frequency of the service, the length of the route, the intermediate points of delivery—in short, all that competition could require as elements for an estimate. These innumerable advertisements of the Post-Office Department cannot be subjected to such critical construction as the one before us; and if their informalities really render contracts founded upon them absolutely void, I am afraid that the draughting of them will have to be taken out of the hands of ordinary executive officials and made the work of the Attorney-General himself.

As to the legal existence of a contract here, the question was carefully considered and expressly decided in Adams's Case, (1 C. Cls. R., p. 192,) wherein it was held that if a party furnishes sureties, and binds himself for the performance of his bid, if accepted, the contract becomes

mutual and binding from the moment of acceptance, although a formal written contract is to be subsequently executed.

As to the amount of damages which the claimant should recover, it is not free from doubt but that his case is ruled by the decision of the Supreme Court in the Reeside Mail-Contract Case, (7 C. Cls. R., p. 89.) But upon this point it is needless to express an opinion.

18 In the Court of Claims of the United States, December term, 1875.

SELUCIUS GARFIELDE *vs.* THE UNITED STATES. } No. 9906.

And now come the defendants, by their Assistant Attorney-General, and ask the court for additional findings of fact in the above-entitled cause, as follows:

1. That the claimant owned no sea-going steamer.

2. That the cost to claimant of carrying the mails in a suitable steamer owned and operated by himself would at least equal the price named in his bid.

3. That the estimates of the cost of carrying the mails on the route in question, in the testimony, are predicated upon the ownership of the vessel employed in the service by the person performing it; and
19 it is not shown that any contract for such could have been made with other owners at any of the prices named in such estimates.

4. That the claimant suffered no present damage in the premises.

THOMAS SIMONS,
Asst. Atty. General.

Filed February 5, 1876.

Upon the foregoing requests by the defendants for additional findings of fact, the court makes the following ruling, to wit:

Refused.

By the court.

20 In the Court of Claims.

SELUCIUS GARFIELDE *vs.* THE UNITED STATES. } No. 9906.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the solicitors for the claimant for the allowance of an appeal, as filed in the clerk's office February 15, 1876, and of the order of the said Court of Claims, allowing the same; of the findings of fact by the court and the conclusion of law thereon; of the opinion of the court; of the dissenting opinion; of the request for additional findings of fact filed by the defendants, and of the ruling of the court thereon.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this 29th day of February, 1876.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) No. 937. Selucius Garfielde, appellant, vs. The United States. Court of Claims. Filed 29 February, 1876.

In the Supreme Court of the United States.

December ~~OCTOBER~~ TERM, 1875.

SELUCIUS GARFIELDE, Appellant,

VS.

THE UNITED STATES.

ARGUMENT FOR APPELLANT.

In the Supreme Court of the United States.

DECEMBER TERM, 1875.

SELUCIUS GARFIELDE, *Appellant*,

vs.

THE UNITED STATES, *Appellee.*

No. 937.

Appeal from Court of Claims.

This case comes to the Supreme Court upon appeal from the judgment of the Court of Claims, dismissing the petition of appellant.

The findings of fact by the court below show:

1. An advertisement of the Postmaster General, inviting proposals for carrying the mails upon route No. 43,132.

2. The proposal of appellant for the invited service named in that advertisement.

3. The acceptance of appellant's proposal by the Post Office Department.

4. Notice of subsequent suspension of said acceptance by the Department.

5. The subsequent contract entered into by the Department with George K. Otis for the same service.

Appellant claims that the foregoing facts constitute a contract between the United States and himself, and the

breach thereof on the part of the United States entitling him to damages.

Adams' Case, 1 Ct. Cls. Rep., p. 192.
Tayloe *vs.* Merchants' Fire Ins. Co., 9 How., 390.
Mayer's Case, 5 Ct. Cls., 317.
1 Barn. & Ald., 681; 6 Ward, 103; 21 N. Y., 305.
Crabtree *vs.* Messersmith, 19 Iowa, 182, and cases cited.
Dupyster *vs.* Pulver, 3 Barb., 284.
Newcomb *vs.* Bracket, 16 Mass., 161.
8 Md., 201; 2 Pet., 102; 26 Wis., 514; 12 Ind., 274.
Chitty on Contracts, 738.

To this proposition the Court of Claims, in their written opinion, assent, provided the Postmaster General had authority, under the law and regulations, to accept the claimant's bid. (Record, p. 9, 2d paragraph.) But they finally reach the conclusion that the Postmaster General in this case undertook to make a contract in violation of law, and that therefore his act in accepting claimant's bid was void and did not bind the United States.

This conclusion seems to be based upon the assumption:

1. That the advertisement for service on route 43,132, "to begin at Port Townsend, W. T., 500 miles less," for which alone appellant tendered a proposal, is not an advertisement fulfilling the requirements of the law, in that it has no schedule of arrivals and departures annexed; and—

2. That the acceptance of such bid by the Post Office Department is in violation of the 267th regulation of the same Department, and is void for the reason that appellant did not first propose for the service from Portland to Sitka, and afterwards put in a separate bid from Port Townsend to Sitka under the invitation contained in said advertisement.

Both of these conclusions are believed to be erroneous, and a departure from well-settled principles of legal construction under the uniform practice of the courts. The advertisement, the proposal of appellant, and the acceptance by the Department constituting the contract, are as follows:

"POST OFFICE DEPARTMENT,
"WASHINGTON, *October* 1, 1873.

"Proposals will be received at the contract office of this Department until 3 p m. of February 2, 1874, (to be decided on or before March 2, 1874,) for conveying the mails of the United States in the * * * * * * * * * * Territory of Washington, from July 1, 1874, to June 30, 1878, on the routes and by the schedule of departures and arrivals herein specified: * * *

"43,132. From Portland, Oregon, by Port Townsend, W. T., and San Juan to Sitka, Alaska, 1400 miles and back, once a month, in safe and suitable steamboats.

"Leave Portland on 1st of every month; arrive at Sitka by the 10th of every month.

"Leave Sitka on the 13th of every month; arrive at Portland by the 23d of every month.

"Proposals invited to begin at Port Townsend, W. T., 500 miles less.

"Present pay, $34,800 per annum."

"*Proposal.*

"The undersigned, Selucius Garfielde, whose post office address is Port Townsend, county of Jefferson, Territory of Washington, proposes to convey the mails of the United States from July 1, 1874, to June 30, 1878, on route No. 43,132, between Port Townsend and Sitka, Alaska, under the advertisement of the Postmaster General, dated October 1, 1873, in safe and suitable steamboats, 'with celerity, certainty and security,' (law of June 8, 1872,) for the annual sum of twenty-six thousand dollars.

"This proposal is made with full knowledge of the distance of the route, the weight of the mail to be carried, and all other particulars in reference to the route and service; and also after careful examination of the laws

and instructions attached to advertisement of mail service.

"Dated Port Townsend, W. T., Jan. 8, 1874.

"SELUCIUS GARFIELDE,

"*Bidder.*"

"*Acceptance.*

"U. S. POST OFFICE DEPARTMENT,

"OFFICE OF THE SECOND ASS'T P. M. GENERAL,

"WASHINGTON, D. C., *March* 2, 1874.

"SIR: The Postmaster General has accepted your proposal, under advertisement of October 1, 1873, for conveying the United States mail from July 1, 1874, to June 30, 1878, on (Washington Territory,) route No. 43,132, between Port Townsend and Sitka, Alaska, at $26,000 a year, 'with celerity, certainty, and security.'

"Contracts will be sent in due time to the postmaster at your place of residence, which you must execute and return to the Department by the 1st day of June, otherwise you will be considered a failing bidder, and the service will be relet at your expense.

"You will request the postmaster at the beginning and end of the route to inform this Office when you make the first trip.

"Respectfully, &c., &c.,

"J. L. ROUTT,

"*Second Assistant Postmaster General.*

"Mr. SELUCIUS GARFIELDE,

"*Port Townsend, Jefferson Co.,*

"*Washington Territory.*

"Recorded and sent March , 1874."

The statutes of the United States regulating the whole subject of contracts for mail service were framed, evidently, with two leading objects in view; the greatest economy and the greatest efficiency of service. To these ends the law-making power has adopted the system of open, general competition, except in certain specified cases, which do not include the one at bar. Great care has been taken to secure to the State the benefits of the lowest responsible tenders, and to the lowest bidder the fruits of his enterprise. In order to make this public

competition, full, fair, and free, section 3941 of the Revised Statutes was enacted. Section 3944 was designed to secure to each bidder an equal opportunity and a just and fair consideration of his proposal. Sections 3945, 3946, and 3953, were designed to prevent fraudulent or "straw" bids, and thereby secure honest competition; and the fruits of the whole system are garnered in section 3949, which aims to secure economy to the State with prompt and faithful service.

If it be true, as herein contended, that the true intent and design of the mail-contract system, as regulated and prescribed by law, is to secure economy and efficiency by means of public and general competition, the conclusions to be reached upon the points at issue are certain and irresistible.

Full and fair competition is the means aimed to be secured by the statute through which the end, economy and efficiency, can best be reached. Such competition fully provided for, the will of the law-maker is satisfied; the purpose of the statute secured. In construing the law regulating postal contracts, it follows that whatever in such statutes is necessary to secure fair and full competition, is mandatory; the remainder directory. The law in prescribing the essential thing to be done, is mandatory. In regulating the manner of doing it, directory.

Cooley on Constitutional Limitations, pp. 74–8 and authorities there cited.

Potter's Dwarris, 224–6 note.

A public notice of the letting, which should, with reasonable certainty, reach those who may desire to compete for the service to be performed, together with a description of the route, and the period through which the contract is to extend, is essential to full and fair competition. As the frequency of the service and the number of points of delivery are elements entering into the calcula-

tions of each bidder, and constituting a part of the basis of cost upon which his estimates are formed, these become essentials of the public notice required, and should be set forth with reasonable certainty. These elements are all found in the body of the advertisement, and constitute no part of the schedule of arrivals and departures. The notice and invitation for proposals are for service from Portland via Port Townsend to Sitka. By special invitation, the bidder is asked to propose from Port Townsend to Sitka—Port Townsend being an intermediate point of delivery on route 43,132. No bidder can possibly misunderstand this. The distance, 1,400 less 500 equals 900 miles, the trips monthly, the mode of conveyance by steam navigation, and the vehicles safe and suitable steamboats. These are all the conditions necessary for the bidder to know in order to make his proposal understandingly. It is wholly unimportant to him whether the mail is to leave one starting point on the first, and the other on the thirteenth of each month or on any other days. His service is monthly, and he contracts to carry the mails with "celerity, certainty, and security." Revised Statutes, section 3949, is as folows:

"That all contracts for carrying the mail shall be in the name of the United States, and shall be awarded to the lowest bidder tendering sufficient guarantees for faithful performance, without other reference to the mode of transportation than may be necessary to provide for the due celerity, certainty, and security thereof; but the Postmaster General shall not be bound to consider the bid of any person who has wilfully or negligently failed to perform a former contract."

This fixes his responsibility, and the Postmaster General has power to prescribe any reasonable schedule of time, and to designate the sailing days without naming them in the advertisement. This will more clearly appear by reference to the 263d regulation of the Post Office De-

partment, and to the 3961st section of the Revised Statutes, which are as follows:

SEC. 263. The Postmaster General may order an extension of service on a route, by allowing therefor a *pro rata* increase on the contract pay. He may change schedules of departures and arrivals in all cases, and particularly to make them conform to connections with railroads, without increase of pay, provided the running time be not abridged. He may also order an increase of speed, allowing, within the restrictions of the law, a *pro rata* increase of pay for the additional stock or carriers, if any. The contractor may, however, in the case of increase of speed relinquish the contract, by giving prompt notice to the Department that he prefers doing so to carrying the order into effect. The Postmaster General may also discontinue or curtail the service, in whole or in part in order to place on the route a greater degree of service, or whenever the public interests, in his judgment, shall require such discontinuance or curtailment for any other cause; he allowing as a full indemnity to the contractor one month's extra pay on the amount of service dispensed with, and a *pro rata* compensation for the amount of service retained and continued.

SEC. 3961. That no extra allowance shall be made for any increase of expedition in carrying the mail unless thereby the employment of additional stock and carriers is made necessary, and in such case the additional compensation shall bear no greater proportion to the additional stock and carriers, necessarily employed, than the compensation in the original contract bears to the stock and carriers necessarily employed in its execution.

These sections empower the Postmaster General not only to change the schedule of arrivals and departures, but also to increase the speed, and that too without cost to the Government, in all cases where no additional means of transportation are required.

From these considerations it seems entirely clear that the sailing days and the time in which the trips are to be made, constitute no essential part of the advertisement, the bidder being ruled to "celerity" on the one hand and en-

titled to reasonable time on the other; and the Pastmaster General having power to change schedule time and sailing days at his option, within certain limits, and without the consent of the contractor. It is reasonable, therefore, to conclude that so much of section 3,941 of the Postal Code as refers to the time of arrivals and departures, is directory only, not facilitating or promoting competition on the one hand, and when published in the advertisement, not binding upon the Department on the other.

The foregoing is submitted in answer to the hypothesis that the schedule of arrivals and departures published in the advertisement of route 43,132 does not apply to the invited service to commence at Port Townsend, and for which appellant submitted his proposal. Yet this view, which seems to be the one taken by the learned judge who delivered the opinion of the court below, is believed to be wholly untenable. A certain, definite post route, beginning at Portland, ending at Sitka, and including the two intermediate points, Port Townsend and San Juan, is advertised. In the list of post routes it is numbered 43,132. In the advertisement, proposals are invited for service, dropping all of said route between Portland and Port Townsend, a distance of 500 miles, and beginning at the latter place, and thence to Sitka, the other terminus of the route, by way of the same intermediate point, San Juan.

Now, if the words "proposals invited to begin at Port Townsend, W. T., 500 miles less," do not relate directly to route 43,132, as advertised, they do not relate to anything and have no meaning. But if they do relate to that route as advertised, then they relate to all the conditions of that advertisement, which is only modified by the words themselves.

It is unreasonable to admit that the words "proposals invited to begin at Port Townsend, 500 miles less," relate to route 43,132 as advertised, and to all of said advertisement except the schedule, and do not relate to that. An ex-

amination of the former portion of this advertisement will develop the fact that the Postmaster General intended the schedule under route 43,132 to apply to the invited service. Proposals are invited for carrying the mail in the Territory of Washington "on the routes and by the schedule of arrivals and departures herein specified."

Now, if the invited service to begin at Port Townsend relates to route 43,132 at all, (which cannot be doubted,) it invites proposals for service on that route as modified by the invitation, and is governed by the same schedule as the service in the original form. The Postmaster General having specified one schedule for that route, has made that schedule applicable to all modifications of that route. Otherwise he would have appended a different schedule. The mail is to be carried "on the routes and by the schedule herein specified." As no other schedule is specified, this declaration makes the published schedule applicable to the same route as modified.

The Court below admits that the invited service relates to the advertisement of route 43,132, modifying it only in regard to starting point and length. Also that the frequency of the service, monthly, may be referred to by relation, but not the schedule. The only appreciable difference between the two, and the only reason for admitting the one and excluding the other, would seem to be the fact that they occur in different lines of the printed advertisement and in different sentences.

The court below arrives at the conclusion that the schedule published under the head of route 43,132 was not intended to apply to the invited service under the same head. The logic of the reasoning by which this conclusion is reached is wholly inappreciable. The Department advertises a route with either of two starting points, and expressly notifies bidders that "proposals will be received for carrying the mails" on that route "*by the schedule* of arrivals and departures *herein specified.*" There is nothing

in the record to show that the Department advertised for one thing and wanted another. The thing wanted is to be ascertained from the advertisement, and the acceptance of appellant's proposal under that advertisement is proof that he bid for the thing wanted. Nothing in the whole record justifies the assumption that the published schedule was not intended to apply to either invitation, or that the Department failed to ask for what it wanted. The logic of surrounding circumstances is equally inconclusive.

The court say :

"The provision for the delivery of the mails once a month might apply equally well to both, but it cannot be supposed in this age, when Congress and the Post Office Department are making such great effort and expending such a vast amount of money to secure swift transportation of newspapers, letters, and correspondence, that it was contemplated allowing the same time, ten days, for taking the mails 500 miles from Port Townsend as for taking them 1400 miles, from Portland to Sitka."

The effort of Congress and the Department "in this age" "to secure swift transportation" of the mails has resulted, in this particular case, in a monthly mail service, with transportation moving with a velocity of less than six miles per hour. It is difficult to understand how the people of Alaska, the only ones interested, could suffer any injury or inconvenience from a monthly mail starting from Port Townsend instead of Portland, provided it arrived there on the 10th of the month in either case. The remoteness of the locality, the meagreness of the population to be supplied, and the few and unimportant business transactions with other sections of the country were matters well understood by the Post Office Department, and a monthly mail, moving at a very moderate rate, was deemed sufficient to answer all purposes, and this was the ruling consideration in making up a schedule for the route

and making it applicable to any service which might be accepted.

By section 396 of the Revised Statutes, third paragraph, it is made the duty of the Postmaster General "to decide on the forms of all official papers" in his Department. An advertisement for mail service is an official paper. The Postmaster General has prescribed a form, adopting a form which the record shows to have been in use in the Department for many years, during which time, at least 907 similar advertisements have been published. The usage of the Department has been uniform in this particular; and the form and intent of such advertisements must have been considered and determined many years ago. In awarding the contract to appellant, the Postmaster General *must* have either followed the settled interpretation and practice of this Department or wantonly departed from it, and there is no pretense of the latter.

To illustrate this point still further: A railroad company advertises for proposals for grading the entire line of their road, the work to be completed at a specified time. Then, in the same advertisement, they invite proposals also for grading one-half the same line without any other specification of time. An accepted bidder, proposing for one-half of the work, would be entitled to the same time for the construction of that one-half that he would have been had he contracted for the whole work—the inference being conclusive that had the company intended a different time for completion of the work, they would have expressed it in the notice.

Admitting, for the purposes of this argument, that the law requiring a schedule of arrivals and departures is mandatory, the question arises whether, under his authority to prescribe the form of all official papers in his Department, the Postmaster General has, in the form adopted, made the published schedule of route 43,132 reasonably applicable to the modified route as there advertised. If

so, the advertisement and the contract under it are legal. The advertisement in this case is one of the elements of the contract; and the rule of law is "that if a contract is susceptible of two interpretations, one legal and the other illegal, that one shall be given which makes the contract valid, for every presumption is in favor of the legality of the contract." (30 Miss., 516; 21 Ill., 258; Chitty on Con. (6 Am. ed.), 639; Williams *vs.* E. Ind. Co., 3 East., 192.) This rule and presumption make the schedule applicable to the route from either starting point, and the proposal of appellant "strictly according to the advertisement;" thus removing it entirely from the operation of the 267th regulation.

Again, putting the advertisement, the proposal and the acceptance together, which, as is claimed, constitute the contract, and applying the rule that, in the construction of agreements, the plain, ordinary and popular sense and application of the terms used shall prevail, and it cannot be doubted that this contract was lawful and complete. Who could doubt the applicability of the schedule to the service from Port Townsend to Sitka, as well as to that from Portland to Sitka? Then it follows that the bid of appellant was strictly in accordance with the advertisement, and the advertisement strictly legal. Had there been no advertisement, there could have been no contract. But an advertisement having been published, its construction and applicability alone remain to be determined; and as, when published, it becomes an element of the contract itself, the rule just cited becomes the law governing its interpretation.

In conclusion, upon this branch of the case, it may be stated that the record shows this advertisement to be in conformity to the long-established and uniform usage of the Department; that the Postmaster General, after mature consideration, accepted appellant's proposal, thereby announcing and presumably following the construction

which had been placed upon such advertisements; that this acceptance was indorsed by Assistant Attorney General Spence of the Post Office Department; and if the opinion of the Attorney General cited in the record means anything, it approves this action of the Department also. This acceptance, deliberately made—a month having been taken for its consummation—completes the contract between the United States and appellant, and renders the former liable for any subsequent breach. The Attorney General prepared and submitted another opinion subsequent to the acceptance of appellant's proposal (14 Op. Att'y Gens., 389) at variance with his former opinion, the reasons for which do not seem to fully appear in the document itself.

As before stated, the second assumption of the court below, upon which its judgment in part rests, is, that the acceptance of appellant's bid by the Post Office Department is in violation of the 267th regulation of that Department, and void, for the reason that appellant did not first propose for the service from Portland to Sitka, and afterwards put in a separate bid from Port Townsend to Sitka, under the invitation contained in said advertisement.

This view is based upon a total misapprehension of the terms employed in and the true meaning of that regulation. The postal code is a system of laws, and regulations having the force of law, which has been the gradual growth of a century, expanding with the increasing demands of that arm of the public service, and growing into a compact and uniform system by accretions and prunings, in harmony with the constantly increasing experience of the Department. During this time certain terms, or words, have come to have certain and definite meanings; and throughout the entire postal code and the regulations of the Department, it will be found that these words are used in such specific, technical sense, and none other. It is believed that the latter assumption of the court below is

based upon an entire oversight of this fact, and a consequent interchangeable use and erroneous construction of words, wholly incompatible with a proper understanding of the law.

The 267th regulation is as follows:

"SEC. 267. Bidders should first propose for service strictly according to the advertisement, and then, if they desire, separately for different service; and if the regular bid be the lowest offered for the advertised service, the other propositions may be considered."

The true interpretation of this regulation depends upon a proper construction of the term "service." A careful examination of the postal code and regulations will lead to the conclusion that the term "service" relates to the *work to be done* on a given post road or route, the *trips back and forth* conveying the mails, and not to the *length* of the trips nor to the *time* in which the trips are to be made. A *post road* is a line between two given points intersecting intermediate post offices. This road or route, as advertised, controls the length of the trips, which cannot be changed or curtailed until after contract made, and then only by virtue of the terms of the contract itself. The *time* in which trips are to be made is always referred to by the term "speed" or "expedition."

The 267th regulation requires that "bidders should first propose for service strictly according to the advertisement, and then, if they desire, for *different service*." A fair construction of the language of the regulation leads to the conclusion that the "different service" must be service not advertised. It would not be a fair interpretation of language to construe this regulation to mean, that bidders should first propose for service strictly according to the advertisement, and then, if they desire, for service according to the advertisement also.

Again, the terms "increase of service," in the language

of the Department and the law, invariably mean an increase of the *number* of trips within a given [illegible] not to an extension in length, for this is absolute[ly] by the law establishing the route, and the a[dvertisement] until after contract made, or, in case of river, routes, by the advertisement itself. Nor do the *time* in which the trips are to be made, for that is always referred to by the term "speed" or "expedition."

In construing departmental regulations having the force of law, the courts will aim to give them a construction in harmony with the spirit and scope of the statutes relating to and controlling the same subject-matter, and not in repugnance thereto, in order, if possible, that both may stand and operate together. Now, the construction apparently given to the 267th regulation by the court below, brings it in direct conflict with the whole spirit and purpose of the statutes regulating the subject of mail contracts, and opens the door for innumerable and gigantic frauds. If the "different service" mentioned in the 267th regulation refers to such changes of starting-point and *length* of route, as may be expressly advertised, and for which bidders are invited to tender proposals, then the regulation cuts off all competition for the shorter route, and authorizes the Department to accept a bid for the shorter route, however excessive in amount, provided the person tendering it is the lowest bidder on the longer route. Indeed, under this construction, the Department, although desiring the shorter service, is precluded from accepting the lowest proposal, if any other person happens to be the lowest bidder for the longer. In the case at bar, if Otis had bid $35,000 for service from Portland to Sitka, and $30,000 from Port Townsend to Sitka; and appellant had bid $36,000 to start from the former, and $20,000 to start from the latter place, the Department could not consider appellant's bid from Port Townsend; but, in case it desired that service, must accept the bid of

based upon an entire oversight of this fact, and a consequent interchangeable use and erroneous construction of words, wholly incompatible with a proper understanding of the law.

The 267th regulation is as follows:

"SEC. 267. Bidders should first propose for service strictly according to the advertisement, and then, if they desire, separately for different service; and if the regular bid be the lowest offered for the advertised service, the other propositions may be considered."

The true interpretation of this regulation depends upon a proper construction of the term "service." A careful examination of the postal code and regulations will lead to the conclusion that the term "service" relates to the *work to be done* on a given post road or route, the *trips back and forth* conveying the mails, and not to the *length* of the trips nor to the *time* in which the trips are to be made. A *post road* is a line between two given points intersecting intermediate post offices. This road or route, as advertised, controls the length of the trips, which cannot be changed or curtailed until after contract made, and then only by virtue of the terms of the contract itself. The *time* in which trips are to be made is always referred to by the term "speed" or "expedition."

The 267th regulation requires that "bidders should first propose for service strictly according to the advertisement, and then, if they desire, for *different service*." A fair construction of the language of the regulation leads to the conclusion that the "different service" must be service not advertised. It would not be a fair interpretation of language to construe this regulation to mean, that bidders should first propose for service strictly according to the advertisement, and then, if they desire, for service according to the advertisement also.

Again, the terms "increase of service," in the language

of the Department and the law, invariably mean an increase of the *number* of trips within a given time, and not to an extension in length, for this is absolutely controlled by the law establishing the route, and the advertisement, until after contract made, or, in case of river, lake, or coast routes, by the advertisement itself. Nor do they relate to the *time* in which the trips are to be made, for that is always referred to by the term "speed" or "expedition."

In construing departmental regulations having the force of law, the courts will aim to give them a construction in harmony with the spirit and scope of the statutes relating to and controlling the same subject-matter, and not in repugnance thereto, in order, if possible, that both may stand and operate together. Now, the construction apparently given to the 267th regulation by the court below, brings it in direct conflict with the whole spirit and purpose of the statutes regulating the subject of mail contracts, and opens the door for innumerable and gigantic frauds. If the "different service" mentioned in the 267th regulation refers to such changes of starting-point and *length* of route, as may be expressly advertised, and for which bidders are invited to tender proposals, then the regulation cuts off all competition for the shorter route, and authorizes the Department to accept a bid for the shorter route, however excessive in amount, provided the person tendering it is the lowest bidder on the longer route. Indeed, under this construction, the Department, although desiring the shorter service, is precluded from accepting the lowest proposal, if any other person happens to be the lowest bidder for the longer. In the case at bar, if Otis had bid $35,000 for service from Portland to Sitka, and $30,000 from Port Townsend to Sitka; and appellant had bid $36,000 to start from the former, and $20,000 to start from the latter place, the Department could not consider appellant's bid from Port Townsend; but, in case it desired that service, must accept the bid of

Otis, although $10,000 higher, for the reason that he was the lowest bidder for the service commencing at Portland. A bidder specially desiring the longer service would not be likely to bid for the shorter at all; for if he happened to be the lowest bidder on the longer, he would exclude *all* bids on the shorter service, however low they might be, and however much the Department might desire that service. Again, Otis, of Brooklyn, N. Y., was the only bidder for service to begin at Portland, and appellant, of Port Townsend, W. T., was the only bidder for service to commence at that point, and neither proposed for service bid for by the other. Under this construction, if Otis had not embraced a continent in his purposes, and considering the wants of the people of the other coast, put in a bid for service upon the North Pacific Ocean, the Department would have been compelled to readvertise the route, as no valid contract could have been made with appellant, although the Department might have desired the very service bid for, and been satisfied with the bid, for the reason that he put in no bid to commence at Portland. It may be further urged that if the "different service" contemplated in the 267th regulation refers to and is limited by the invitations for modifications of service specially named in the advertisement, that the regulation is not only repugnant to law, but wholly useless, the bidder and Department being both empowered and limited by the advertisement itself.

This construction closes the invited service to competition, and at the same time removes all limits to departmental discretion in such cases, and in both particulars stands in direct conflict with the whole spirit and purpose of the statutes relating to postal service contracts. The law-making power has aimed, with great care and particularity, to secure unlimited competition, and to confine departmental discretion within reasonable limits. Both these ends are lost in accepting the construction of the Court of Claims.

It follows, then, from the foregoing considerations that the only legal and consistent view which can be taken of the 267th regulation is, that it authorizes bidders, who have submitted proposals for the advertised service, to put in separate bids for more or less frequent trips upon the route advertised—for an increase or diminution of service, and the Department agrees to consider the separate proposition of the lowest bidder for the advertised service. This view is in entire harmony with the object of the law in inviting competition, and at the same time fixes a legal limit to departmental discretion. By the regulation itself, the Postmaster General can consider the separate proposal of the lowest regular bidder only, and can accept it only in the event that the bid for the greater or less number of trips than the number advertised for, falls within the limitation contained in section 260 of the postal code (Revised Stat., sec. 3960), which provides that "compensation for additional service in carrying the mail, shall not be in excess of the exact proportion which the original compensation bears to the original service."

This being the only construction of which the 267th regulation admits, without placing it in direct conflict with the will of the law-maker, it follows that it is the correct one, and that the regulation in question has nothing whatever to do with the case at bar. The Department advertised for proposals for carrying the mails for a specified length of time upon a certain, definite, distinctly numbered route, stating the frequency of the trips and the time of arrival and departure. It, then, in the same advertisement, invited proposals for service on this same route, to commence at either of the two starting points on the route; the one five hundred miles nearer the point of destination than the other, and expressly declared that the mail was to be carried upon that route "by the schedule of departures and arrivals herein specified." It would seem that language like this, standing in the connection it does, could receive but one construction, a construction so plain

and natural that both appellant and the Postmaster General understood it in the same way, and both acted upon it. This action would have been final and conclusive had it not been for an after-thought of the then Attorney General, who took the trouble to advise the Department in a second opinion, that its action, in following the uniform construction and practice of thirty years, and awarding a contract, was in violation of law. Apparently convinced that the advertisement standing alone, was valid, and that the schedule applied to the route from either point, the Court of Claims were constrained to bring, in the 267th regulation, to give a different and adverse construction to the language of the advertisement itself.

Aside from all other considerations, the facts that the Postmaster General published a notice in the form approved by himself, that appellant tendered a proposal under that notice, that the Postmaster General, after due consideration, accepted that proposal, and that the action of both parties to the contract shows that they understood the advertisement alike, seem conclusive. For the purposes of a contract, the joint and harmonious understanding of the parties thereto, at the time it is made, becomes the authoritative rule of interpretation of all ambiguous parts of it. It is not pretended that the United States, the appellant, or any other person, was misled or injured by the construction placed upon the advertisement by the Department and appellant; and in order to nullify and abrogate the contract made under it, a construction exceedingly technical must be adopted, and a departure from the long established usage of the Department commenced.

The heads of Department are limited in their action by well-defined boundaries of statutory enactment, but within these landmarks are large fields for the exercise of Executive discretion. Having published a notice for proposals for mail service, in the form which his judgment ap-

proved, and which, by long continued usage in the office, had become, not only well understood, but a part of the common law of the Department, the Postmaster General accepted the proposal of appellant for service under that advertisement, and thereby exercised and exhausted his discretion in that respect and for the purposes of that case. (Madison *vs.* Marbury, 1 Cranch, 5 Court of Claims, 468.) The appellant tendered a bid under that advertisement, in accordance with the invitation thereof. This the proposal tendered abundantly shows. This proposal the Postmaster General accepted, understanding it in the same way; otherwise he would have rejected it. The advertisement is within the legal discretion of the Postmaster General, and therefore valid; and for the purpose of this case, the mutual and concurrent understanding of the parties becomes the rule of interpretation.

The doctrine is well settled that, where an executive officer is required to do a particular thing, and the form or manner of doing it is expressly left to his discretion or judgment, the form adopted by him will be held to be lawful if, by legal intendment or relation, its parts can be understood and construed in harmony with the statute. The last opinion of the Attorney General, in holding that such a form should be so construed as to render it illegal and the contract void, is believed to stand alone among the emanations from well-trained, logical, and eminent minds.

In what respect, then, did the Postmaster General, in awarding this contract to appellant, overstep the boundaries of departmental discretion, as fixed by law? Not in failing to advertise, for this the record shows he did. Not in the form of the advertisement, for that is by the law expressly confided to his judgment. Not in inviting proposals for the service, to commence at an intermediate point between the termini, for, by the law, he may curtail the length of trips in the interest of economy, whenever,

in his judgment, the public interests will thereby be promoted; not in considering appellant's bid, for he had invited just such proposals; not in awarding the contract to appellant, for the law compelled him to accept the proposal of the lowest bidder tending sufficient guarantee of performance. Then it would seem to follow that the judgment of the court below can be sustained only by rejecting for informality an "official paper," the form of which, by law, is confided to the judgment of the officer who published it; or, by holding that the invitation for service, to commence at Port Townsend, bears no relation to the terms and conditions of the advertisement of route 43,132, with which it stands associated, and of which it forms a part, a conclusion which is believed to be at variance with all sound principles of legal construction, and certainly in conflict with the mutual understanding of the parties, who, in good faith, acted under it.

It is not pretended that any one misunderstood the advertisement, or that any one has suffered, or could suffer loss by such misunderstanding. It is not pretended that the service from Port Townsend would not have subserved the interests of the public as well as from Portland; nor is it claimed that the Government would have suffered loss by permitting appellant to enter upon the performance of his contract. On the other hand, the record shows that such action would have saved the Government, during the life of this contract alone, the sum of $35,200. The sum total gained by the breach of the contract with appellant was the establishment of an arbitrary, narrow, forced, and exeeedingly technical construction of an "official paper," and a regulation of the Department, at the cost of establishing a bad precedent, of $35,200 to the Treasury, and of great injury to the appellant.

It was argued in the court below, on behalf of the United States, that if the appellant was entitled to recover at all, the measure of damages would be one month's pay,

to which a contractor is entitled upon discontinuance of service, under the 263d regulation of the Department. This position is believed to be wholly untenable, that regulation having no reference to a contract broken by the United States, and it would be void if it had any such reference. It is a part of each contract that the Department may discontinue any service, in whole or in part, by allowing one month's extra pay upon the portion discontinued; but no contract can provide for its own breach, as such provision would constitute an alternative condition of the contract itself; nor is it pretended even that there has been any discontinuance of service on this route. The record shows that the service has been continued under the subsequent contract with Otis, so that the position assumed, in point of law or fact, does not appear to have any bearing upon this case, and requires no further discussion.

All of which is respectfully submitted.

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Attorneys for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1875.

SELUCIUS GARFIELDE, APPELLANT,
vs.
THE UNITED STATES.
} No. 937.

APPEAL FROM THE COURT OF CLAIMS.

Argument for the United States.

In the Supreme Court of the United States.

OCTOBER TERM, 1875.

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STATEMENT OF THE CASE.

A commencement was made upon the argument of the law of this case before seeing the appellant's brief, upon the supposition that he would state the facts and the alleged errors, as required by the first and second paragraphs of section 4 of the twenty-first rule of this court; but as this rule has been entirely disregarded by him, we will first briefly set the essential facts in their proper order, premising that the statutes under which departmental action was had were those relating to the post-office, (where the controversy arose,) consolidated by act of June 8, 1872, c. 335, (17 Stats., 283–330,) and not those contained in the present revision.

Intending to act in conformity with section 243 of that

chapter, (17 Stats., 313,) which provides "That *before making any contract* for carrying the mail, other than those hereinafter excepted, the Postmaster-General shall give public notice by advertising once a week for six weeks in one or more, not exceeding five, newspapers published in the State or Territory where the service is to be performed, one of which shall be at the seat of government of such State or Territory; *and such notice shall describe the route*, the *time at which the mail is to be made up*, the *time at which it is to be delivered*, and the frequency of the service," * * * the Postmaster-General published an advertisement October 1, 1873, inviting proposals for carrying the mails from July 1, 1874, to June 30, 1878, over route numbered 43132, (among others,) from Portland, Oreg., by way of Port Townsend, Wash., and San Juan, to Sitka, Alaska, as follows, [Record, 4, folio 9,] omitting the date given above: "Proposals will be received at the *contract-office* of this Department until 3 p. m. of February 2, 1874, (to be decided on before March 2, 1874,) for conveying the mails of the United States in the Territory of Washington from July 1, 1874, to June 30, 1878, on the routes and by the schedules of departures and arrivals herein specified. * * * * *

"43132. From Portland, Oregon, by Port Townsend, (W. T.,) and San Juan, to Sitka, Alaska, 1,400 miles, and back, once a month, in safe and suitable steamboats.

"Leave Portland on 1st of every month; arrive at Sitka by the 10th of every month.

"Leave Sitka on the 13th of every month; arrive at Portland by the 23d of every month.

"Proposals invited to begin at Port Townsend, (W. T.,) five hundred miles less.

"Present pay, $34,800 *per annum*."

George K. Otis made a bid for service from Portland to Sitka, as required by the advertisement. He made no proposal to begin at Port Townsend. [Record, 5.] Selucius Garfielde, the claimant, made this proposal:

"The undersigned, Selucius Garfielde, whose post-office address is Port Townsend, county of Jefferson, Territory of Washington, proposes to convey the mails of the United States from July 1, 1874, to June 30, 1878, on route No. 43132, between *Port Townsend* and Sitka, Alaska, under the advertisement of the Postmaster-General, dated October 1, 1873, in safe and suitable steamboats, with 'celerity, certainty, and security,' (law of June 8, 1872,) for the annual sum of twenty-six thousand dollars.

"This proposal is made with full knowledge of the distance of the route, the weight of the mail to be carried, and all other particulars relative to the route and service; and also *after a careful examination of the laws and instructions attached to advertisement of mail-service*." [Record, 5.]

This proposal was dated at Port Townsend January 8, 1874, and signed by the claimant. Among the "instructions attached to advertisement of mail-service," which were carefully examined by the bidder, was this:

"SEC. 267. Bidders should *first* propose for service *strictly* according to the advertisement, and *then*, if they desire, *separately* for different service; and *if the regular bid be the lowest for the advertised service*, the other proposition may be considered." [Record, 7, bottom of page.] It will be noticed that Mr. Garfielde made no proposal to start at Portland or to deliver a mail there, and made no statement of the frequency of service, nor the times of starting and delivery at the termini he suggested.

Mr. Otis objected to the consideration by the Department of Garfielde's bid, on account of these deficiencies, and because G. was a collector of customs. The Assistant Attorney-General for the Post-Office Department overruled these objections, and this opinion was hastily approved by Attorney-General Williams, April 3, 1874, but, on reflection, he reversed that opinion April 22, 1874, upon the ground that Mr. Garfielde's proposal was not after due advertisement made, so as to authorize a contract with him. [Record, 6, folio 11; 14 Atty. Gen.'s Op., 389.] Attorney-General Williams states that his attention was not called to this point, but only to the other, when he signed an approval indorsed upon the opinion of his assistant for the Post-Office Department. [14 Atty. Gen.'s Op., 389.] In the mean time, some time in March, 1874, the Second Assistant Postmaster-General mailed a notice to the claimant that his proposal had been accepted by the Postmaster-General, and that contracts would be sent to him in due time, which he must execute and return to the Department by the 1st day of June. April 18, 1874, he telegraphed Mr. Garfielde that this acceptance was suspended. (Record, 6.) The Postmaster-General was guided by the opinion of the Attorney-General, and declined to contract with Mr. Garfielde, and did so with Mr. Otis. The form of advertisement used had been in use for many years; 907 cases of similar advertisements having been proved, but none of any contract made under them by one who did not bid for the regular service. (Record, 7, folio 12; 11, end of folio 15.) The court found the claimant's profit above all expense, care, trouble, and risk, would have been $15,000 *per annum;* but that, upon the facts, he was not entitled to recover, and that his petition must be dismissed. (Record, 7, 8.)

BRIEF.

In the administration of the Post-Office Department, for the purpose of identifying the lines and modes of conveyance by which, and the termini between which, mails are to be carried, and the intermediate points at which they shall be left and received, the country has been divided into *routes* designated numerically. Every such route thus has a distinct existence or identity. That from Portland, Oreg., to Sitka, Alaska, via Port Townsend, Wash. Ter., and San Juan, is 43132, over which the mails are carried, necessarily almost, in steamboats. This number, then, indicates a route with established termini and a stoppage at but two intermediate points. Its length is fourteen hundred miles, viz: five hundred from Portland to Port Townsend, and nine hundred from the latter place to Sitka.

By the act of June 8, 1872, c. 335, the statutes relating to the Post-Office Department were revised, consolidated, and amended, and prior statutes repealed. To conform to this legislation the regulations of the Department were also revised and codified, and a volume was issued by that Department, authenticated by the signature of the Postmaster-General, April 5, 1873, containing these laws, regulations, and instructions. To this compilation reference is made. The necessity for advertising for contracts to carry the mails arises wholly from the statute provisions of the aforesaid act of June 8, 1872, c. 335, § 243, and is not affected by any regulations. This section (243) is found in 17 Stat., 313, and upon pages 88 and 89 of the compilation. It provides, "That before making any contract for carrying the mail, other than those hereinafter excepted, the Postmaster-General shall give public notice by adver-

tising once a week for six weeks in one or more, not exceeding five, newspapers published in the State or Territory where the service is to be performed, one of which shall be published at the seat of government of such State or Territory; and *such notice shall describe the route, the time at which the mail is to be made up, the time at which it is to be delivered, and the frequency of the service;* and the Postmaster-General shall direct, by special order in each case, the newspapers in which mail-lettings or other proposals relative to the business of his Department shall be advertised, and no publisher shall be paid for such advertisements without having been requested by the Postmaster-General to publish the same."

What was meant by this requirement, that the times of making up and of delivering the mail should be stated, can be seen by reference to the act of March 3, 1825, c. 64, § 10, (4 Stats., 104,) in force from its date up to the enactment of the consolidated laws relating to the Post-Office of June 8, 1872. This act of 1825 made it the duty of the Postmaster-General to state in his advertisement "the places from and to which such mail is to be conveyed, the time at which it is to be made up, and the day and *hour* at which it is to be delivered." When we consider the subject-matter we at once see the importance of the speediest transit consistent with safety and regularity, and that this has been recognized in the legislation of Congress for half a century.

Under these statutes, upon the 1st day of October, 1873, advertisement was made (Record, 5, folio 9) for proposals for carrying the mails over the various routes in the States and Territories near and beyond the Rocky Mountains, and among them for a monthly mail over

this route 43132, described by its termini and intermediate stops, its distance, mode of transportation, and times of departure from and arrival at each terminus; after these, was added this line: "Proposals invited to begin at Port Townsend, Wash. Ter., five hundred miles less."

George K. Otis made a bid for carrying the mail monthly each way over this route according to the times stated in the schedule, at the rate previously paid, $34,800 *per annum*. He made no proposal to start at Port Townsend. Mr. Garfielde, the claimant, proposed to carry the mails between Port Townsend and Sitka, for $26,000 *per annum*, without specifying the frequency of the service, nor the times of departure and arrival. *He made no proposal to carry the mail over the then existing route*, 43132. These facts are to be taken in connection with sec. 267 of the Post-Office Regulations, found upon page 195 of the before-mentioned compilation, which says: "SEC. 267. Bidders should *first propose for service strictly according to the advertisement*, and then, if they desire, separately for different service; and *if the regular bid be the lowest* offered for the advertised service, the other propositions may be considered." Section 269 (same page) requires that the *service* be distinctly stated in the bid. The Contract Office and Division of the Post-Office Department is under the charge of the Second Assistant Postmaster-General, and to it "is assigned the business of arranging the mail-service of the United States, and placing the same under contract."

* * * "It prepares the advertisements for mail-proposals, receives the bids, and has charge of the annual and occasional mail-lettings, and the adjustment and execution of the contracts." (Postal Laws and Regulations, 148, § 3.)

Under this general authority, Mr. Routt, then Second Assistant Postmaster-General, notified Mr. Garfielde of the acceptance of his proposal, in March, 1874, by mail, and telegraphed him April 18, 1874, that its acceptance was suspended until the opinion of the Attorney-General as to the legality of the proposal and contract could be obtained. (Record, 6, folio 11.) This opinion was adverse to their validity. (Atty. Gen. Ops., vol. xiv, p. 389.) A contract with Mr. Otis, upon the terms of his offer for the entire route, was then made.

October 9, 1874, Mr. Garfielde demanded the execution of a contract with him, which was refused.

As the dissenting opinion of Mr. Justice Nott gives to the action of the Second Assistant Postmaster-General, in notifying Garfielde of the acceptance of his bid, the full effect of a completed contract, we will first consider the extent of, and limitations upon, the power of the Postmaster-General, treating, for the moment, the act of his subordinate as if it were his own; though we think we can show hereafter that, taking the claimant's statement of the law, Mr. Routt exceeded the authority delegated to him.

Conceding the position of Judge Nott, which we doubt not will be also assumed by the appellant, whose brief has not yet come to hand, that the heads of Departments cannot be compelled by mandamus to perform in a particular manner an act in relation to which a choice of the means of its execution is confided to their discretion; nor to give to a statute any peculiar construction; it by no means follows that when, in the ordinary course of litigation, the question of the existence and validity

of a contract, depending upon the effect to be given to a statute, comes before a court, the judiciary are to be bound by the view of the law which, from his conduct in a single instance, (or in many instances,) it is assumed that the head of a Department indulged. In the cited case of United States *vs.* Alexander, (12 Wallace, 117,) it was the subsequent legislation of Congress, *indicative of its intention in the original enactment*, that determined the correct interpretation of the pension act then under consideration. If the Commissioner of Pensions and the Second Assistant Postmaster-General can preclude, by their action alone, the Supreme Court from declaring the *true* meaning of the law—*i. e.*, the intention of the law-makers—we do not know to what grade of clerkship this tribunal is subordinate.

"A mistaken opinion of the legislature concerning the law, does not make law." (Postmaster-General *vs.* Early, 12 Wheat., 148.)

The head of each Department is authorized to make such regulations for the conduct of its employés and its business, as are "not inconsistent with law." Whether they are so or not, in any given instance, is not left to their framer finally to decide, but it is a judicial question when it arises in the course of litigation. It is *only* when "not inconsistent with law" that this court has held that these regulations have the force of law. Formerly, the statute provided that the rules and articles of war, enacted by Congress, might be modified and changed by the action of the Commander-in-Chief; but, because no such provision was made relative to the Navy, Mr. Cushing, then Attorney-General, advised the head of the latter Department, April 5, 1853, that the code of "Navy regulations" was in derogation of the constitu-

tional powers of Congress, and, "as the mere act of the President in a matter not within his executive jurisdiction, is destitute of legal validity or effect." (6 Atty. Gen's. Ops., 10–18, 19.)

It is only those regulations framed "conformably to law" that "are entitled to the same respect and obedience as acts of Congress." (Record, 7, folio 12.)

"The rules and orders promulgated through him (the Secretary of War) must be received as the acts of the Executive, and as such be binding upon all, *within the sphere of his legal and constitutional authority.*" (United States *vs.* Eliason, 16 Peters, 302.) And the limits of that sphere are not merely self-imposed, nor to be enlarged by any construction the head of a Department may put upon a statute relating to its business.

"The Secretary of the Treasury is bound by the law; and although, in the exercise of his discretion, he may adopt necessary forms and *modes of giving effect to the law*, yet neither he nor those who act under him *can dispense with* nor alter *any* of its provisions." (Tracy *vs.* Swartwout, 10 Peters, 95.) That was an action of tort for the conversion of sugar, withheld to compel payment of an excess of duties.

"As the Post-Office act expressly required quarterly payments to be made by all postmasters, any contract by the Postmaster-General which impugns this provision is utterly void for illegality. (Locke *vs.* United States, 3 Mason, 455.)

The substance of the whole matter is stated in United States *vs.* Wright, (11 Wallace, 648,) that the decision of the Postmaster-General as to the existence of *facts* upon which he is to exercise his discretion is conclusive, but of course it is not so as to the law. This was the

advice given by Attorney-General Cushing to the President, November 23, 1853, (6 Ops., 226,) that where "the head of the Department advertises *in due form* for sealed proposals, the bidder, *fulfilling the conditions of the law and of the proposals*, is to receive the contract;" and the award of it cannot be vacated by the President upon the ground that, "although the Secretary of the Interior acted honestly in the matter, yet he decided erroneously as to the *questions of fact*."

Cases were cited by the plaintiff below, and others to the same effect might easily have been found, that the action of the heads of Departments is to be taken to be authorized by the Chief Executive; but these relate only to acts which the President himself could lawfully do. It is as much beyond his power as that of any of his subordinates to act in contravention of those laws to the execution of which, as they are, he is specially pledged.

That Mr. Justice Nott could cite (Record, 11, folio 16,) Decatur *vs.* Paulding, 14 Peters, 497, to show that construction of a statute by the head of a Department is such an exercise of discretion as not to be interfered with by the judiciary in any such sense as that the court cannot declare his construction correct or erroneous, as they may find it to be, is an instance of the very different ideas that legal men may draw from the same opinion. True, he states correctly the position of this court in that case, "that the judiciary cannot revise his judgment *by mandamus* or interfere with his discretion;" but he goes on with his inferences as though the declaration was that the Cabinet minister's decision is final, and not reviewable even in a case of ordinary litigation like the present. It is only in the discharge of

his official routine duties that his *discretion* is not to be directed by mandamus; as to *ministerial* acts, he may be so guided. In that case (14 Peters, 516) the court say: "The interference of the courts with *the performance of the ordinary duties* of the Executive Departments of the Government would be productive of nothing but mischief."

Upon the preceding page (515) is stated the occasion for any examination of the correctness of the statutory construction adopted by the head of a Department. "If a *suit* should come before this court which involved the construction of any of these laws, the court certainly would *not* be bound to adopt the construction given by the head of a Department. And if they supposed his decision to be wrong, [or right,] they would, of course, so pronounce their judgment. But their judgment upon the construction of a law must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the act of Congress, in order to ascertain the rights of the parties in the cause before them. The court could not entertain an appeal from the decision of one of the Secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment. Nor can it by *mandamus* act directly upon the officer, and guide or control his judgment or discretion in the matters committed to his care, in the ordinary discharge of his official duties." (Decatur *vs.* Paulding, 14 Peters, 515.)

Thus far had we written before receiving the appellant's brief. As what is said is applicable to the opinion of the dissenting justice, we will say, "What I have written, I have written," and let it stand, though we are surprised to see that the claimant has substituted a gen-

eral disquisition, mainly resting upon his own assertions, for the logically arranged brief filed below upon points substantially as indicated in the dissenting opinion.

If the conclusion reached by the Court of Claims in disposing of the cause is correct, it matters little what legal propositions are enunciated in the opinion.

We humbly submit that the general principles applicable to contracts between individuals must be restrained where the Government is a party by the degree of authority conferred by law upon its agents by whom they are, or are claimed to be, made.

Since every citizen is presumed to know the laws he has helped to make, and in this case Mr. Garfielde states that he had given them and the regulations made under them careful examination, the United States are only bound to the extent they have actually given power to him who professes to be acting as their agent. (Lee *vs.* Munroe, 7 Cranch, 366; Hunter *vs.* United States, 5 Peters, 188; Johnson *vs.* United States, 5 Mason, 425; United States *vs.* City Bank, 6 McLean, 130; 9 Atty. Gen.'s Ops., 18.)

In no case does an agent's mistake of *law* bind his principal.

Though it is very true that the same principles apply to contracts made with the Government as to those made with individuals, yet the mode and power of contracting is very different. It is limited and defined by statute. Thus, the act of June 8, 1872, sec. 209, gave to the Postmaster-General the power to "contract for the transportation of the mails to and from any post-office;" but the section printed above (sec. 243) required that "*before* making any contract for carrying the mail,"

he should give the notice containing the items stated, being a description of the route, times of arrival and departure, and the frequency of the service, &c. When the statute confers a power, the regulative provisions which it imposes on its exercise are essential and imperative. The observance of the prescribed forms and duties is a condition precedent to the *power* to contract. Such conditions always require *literal* compliance with their terms. The claimant throughout speaks of the advertisement as part of the alleged contract, whereas it was only an essential prerequisite to the ability to make any contract, and not part of the contract when made. Between individuals the proposal and its acceptance would (unless some law repugnant thereto intervened) constitute a contract; but they do not with the Government, unless there has been an advertisement, and *such* an one as the statute prescribes; what Mr. Attorney-General Cushing calls "*advertisement in due form.*" (6 Ops., 226.)

It is stronger than the case of an officer who is required to do certain acts, or give specified notices, to enable others to exercise the right of franchise, or other privileges; because the Postmaster-General is the agent of the United States, possessing the power to bind his principal *only sub modo*, in the precise manner indicated by the statutes, known equally to him and to those who deal with him. He is authorized to contract with regard to but one subject, postal facilities, and as to that, only in those instances where he has given the specific notice required by law. This is a limitation upon, and a condition precedent to, the exercise of his agency. The statute creates all the power that is possessed, and those who act under it must clothe all their proceedings

with the prescribed solemnities. This is the case with all bodies that, like the United States, have only a legal existence, and can only act through agents. (Head *vs.* Prov. Ins. Co., 2 Cranch, 168, 169; Leominster Canal *vs.* Shrewsbury Ry., 3 Kay & J., 654; Brooks *vs.* Cock, 3 Ad. & El., 141; Cope *vs.* Thames Dock Co., 3 Exch., 841; Diggle *vs.* Ry. Co., 5 *Ib.*, 442; Cornwall Co. *vs.* Bennett, 5 H. & N., 423.)

In various instances the prescribed *form* is held essential to the validity of a contract. So, in the case of a mortgage, by the terms of the English merchant shipping act of 1854, Liverpool Bank *vs.* Turner, (2 De G., F. & J., 502,) where Lord Campbell said (p. 508) "I cannot doubt that the legislature intended these and no other forms were to be used." (Rex *v.* Jeffries, 4 T. R., 767; Davidson *v.* Gill, 1 East, 72.) That an award of official commissioners must correspond with their advertisement, see King *v.* Washbrook, (4 B. & C., 732.) That word reminds me to remark that the awards of referees must always follow the submission from which their authority is derived; and the present instance is analogous, the Postmaster-General having submitted to him under the statute the bids for carrying the mails.

It is not alleged that the contract set up by Mr. Garfielde is void for want of consideration, mutuality, or memorandum in writing; but that the Postmaster-General had not taken those steps which would authorize him to contract with anybody for the conveyance of mails between Port Townsend and Sitka as an independent route. We shall hereafter show why there was an additional reason why he could not contract for that service with one not the lowest bidder for route 43132.

The claimant argues that an advertisement of the pur-

pose to contract that does not contain the particulars specified by the statute is sufficient. If that be so, then this section (243) of the act of June 8, 1872, was entirely superfluous, since the act of March 2, 1861, chap. 84, § 10, 12 Stats., 220, provided that all contracts for services, in any of the Departments of the Government, "shall be made by advertising a sufficient time previously for proposals respecting the same."

This act of June 8, 1872, chap. 335, was a re-enactment of the before-mentioned act of March 3, 1825, chap. 64, § 10, 4 Stats., 104, requiring twelve weeks' publication, a specific designation of places, and of "the time at which it (the mail) is to be made up, and the day and *hour* at which it is to be delivered." As the act of June 8, 1872, uses less explicit language as to the definite moment of delivery, this is a case for the application of a familiar principle of construction, thus expressed by the latest writer upon the subject: "One of these presumptions, especially applicable to the interpretation of general words, is that the legislature does not intend any alteration in the law beyond what it explicitly declares, either in express terms or by unmistakable implication." (Maxwell on Statutes, 66.) *Time*, certainly, is the very essence of these contracts. "*Celerity*," as well as certainty and security, was to be assured in the engagement for carrying these mails. Now, what time was to be made, what rate of speed is deemed celerity, in the advertisement and claimant's proposal as to mails starting at Port Townsend? If ten days was sufficient celerity in going over one thousand four hundred miles, it certainly could not be so for nine hundred.

Let us see what are the elements of an advertisement sufficient to authorize a contract. First, it must "de-

scribe the route." Is that done? Can this court say, from the advertisement, proposal, and acceptance, whether or not Mr. Garfielde would have been under obligation to diverge upon every voyage a long distance from the most direct line between the termini to land and receive mails at San Juan? Yet that place was clearly entitled to these postal facilities under the original advertisement of route 43132. Mr. Garfielde's bid contained no stipulation to stop there, though that island was of sufficient consequence to disturb our relations with England for years, and to threaten a conflict of arms for its possession.

Second, it must state the time of taking and that of delivering the mail. What were these, under the alleged contract? To show that *any* were indicated, the claimant is driven to the preposterous supposition that they were to be the same whether the distance to be traversed was one thousand four hundred miles or only nine hundred! And that this rate of speed would be "celerity," though he says it is only six miles an hour for the longer distance. It would be three and three-fourths miles an hour under his bid, as he claims it. He does not notice the fact, that if the boat started from Portland she would lose some of her hours putting in to Port Townsend and San Juan; and, therefore, that there is more time required for the whole route, 43132, as compared with his offer, than would be indicated by the ratio of 14 to 9. Allowing a day for each divergence, the speed would be seven and three-tenths miles per hour on route 43132. True, the calendar days of departure may (or may not) be of small consequence; but those occupied in the transit are very important.

Third, "the frequency of the service." Claimant now

says that the service was to be performed once a month each way, but he did not say so in his proposal, nor was this stated in the line inviting proposals. Near the top of the ninth page of his brief he says: "Proposals are invited for carrying the mail in the Territory of Washington 'on the routes and by the schedule of arrivals and departures herein specified;'" and then argues that these schedules of the Portland-Sitka route apply to the proposals invited for one beginning at Port Townsend. But the record shows (at the top of page 5) that route 43132 is an excerpt from a whole string of advertised routes in the Pacific States and Territories; and that whole columns of matter, scores of statements of the times of arrivals and departures, intervened between the words he quotes and the line inviting such proposals as he claims to have made. All these statements of mail-days go to make up "the schedule of arrivals and departures herein specified." Upon the statute alone, then, the line relating to a Port Townsend-Sitka route was not an advertisement sufficient to authorize a contract. The claimant admits, (Brief, p. 12, line 25,) that "Had there been *no* advertisement, there could have been no contract;" but it is not merely *an* advertisement, but one couched in terms conformable to law that is requisite. Suppose the end sought be precisely what he alleges; yet it can only be attained by the means Congress has indicated as appropriate and necessary to accomplish the desired purpose. Upon page 20 of their brief, second paragraph, counsel say: "It is not pretended that any one misunderstood the advertisement, or that any one has suffered, or could suffer, loss by such misunderstanding." We beg leave to differ.

How does this court understand the contract set up by claimant to be, as to the time of arrivals and departures? Did not the Court of Claims and the claimant have a "misunderstanding" as to the terms of that advertisement? Must a mail be left at San Juan? Would not the citizens of these places suffer if they lost mail facilities, or if they were furnished with aggravating dilatoriness, in consequence of the ambiguity of this advertisement and the proposals?

But the statute does not stand alone. The regulations of the Post-Office Department as to bids explain the whole advertisement consistently with law. Sec. 267, heretofore quoted and found in Record, bottom of page 7, requires bidders *first* to "propose for service *strictly* according to the advertisement," *i. e.*, such advertisement as the law requires; and then, if they desire, separately for different service; and *if the regular bid be the lowest offered for the advertised service*, [not otherwise,] the other proposition may be considered." This line at the end of the advertisement of route 43132 indicated for what "different service" regular bidders might propose, with a prospect that their proposition would be considered. This was the sensible view taken by the Court of Claims. [Record, 10, 11.] The Portland-Sitka route, 43132, was evidently the "advertised service," and proposals for that were the "regular bids." The reason for requiring propositions from all bidders for the advertised service *first* is plain. It was to establish a standard of comparison by which it could be ascertained who was entitled to the contract as the "lowest bidder." Otherwise, there would be a competition of routes, schedules, and bids. No such indiscriminate, absurd jumble

is invited, nor could any valid contract be based upon such an advertisement. The claimant filed *no* "regular bid," and, therefore, was not entitled to have his proposals considered. Mr. Otis's bid was in fact the lower, being at the rate of $24.86 per mile, while Garfielde's was $28.89 per mile. If the Postmaster-General exercises his right to curtail the length of the route, so that it starts from Port Townsend, making a *pro rata* deduction of compensation, (as he may, by the regulations, p. 195, § 263,) Otis's annual pay will be $22,365, instead of the $26,000 bid by Garfielde. Had Garfielde's bid been valid and a binding contract made under it, and the Department had desired to extend the route so as to start from Portland, paying the *pro rata* increase, he would have been entitled to $40,432 instead of the $34,800 paid Otis. So counsel err when they say, (Brief, p. 20,) "Nor is it claimed that the Government would have suffered loss by permitting the appellant to enter upon the performance of his contract," and that "on the other hand, the record shows that such action would have saved the Government during the life of this contract alone the sum of $35,200." If the service from Portland to Port Townsend were necessary to be done, it would have to be contracted for with somebody; if it proves unnecessary, the Department (as above stated) can curtail the route, and save, "during the life of this contract alone," the sum of $14,540, or $3,635 annually, the difference between Garfielde's $26,000 and Otis's bid curtailed *pro rata* to $22,365. Thus it is shown that the claimaint was not the "lowest bidder."

The syllogistic statement (appellant's brief, 11) that by R. S., § 396, the Postmaster-General is to "decide on the form of all official papers," and that an advertise-

ment is such an official paper, and therefore to be in a form prescribed by him, hardly requires notice. He can decide what form it shall take so as to carry out the law, not dictate one regardless of law. The last clause of the section is that he is to "execute all laws relative to the postal service." The forms prescribed by him are to be framed for this purpose.

The allusion to the usage of the Department is unfortunate for the claimant. (His brief, 11.) The researches among its files showed that "at least 907 similar advertisements have been published," but that *in no single instance does it appear that a contract has been awarded to one who was not the lowest responsible bidder for the advertised service upon the regular route !!* "The usage of the Department has been uniform in this particular; and the form and intent of such advertisements must have been considered and determined many years ago." That no contract was ever made with one not the lowest regular bidder for advertised service, is evident from the regulations, sec. 267, and from the omission of the claimant, through whom these explorations of the records were made, to show any such instance. The usage to *advertise* thus is immaterial, even if a usage to *contract* could be material, in view of the statute.

The weakness of the claimant's case is made still more apparent by the suggestion of an analogy where none exists. (Brief, 11.) The grading of a road-bed can be, and usually is, carried on along the whole length of the entire line, or many sections of it, at the same time; but the same mail-bags, and the mailable matter contained in them, and the vehicle in which they are borne, cannot be going over the whole distance between the termini of the route at the same moment; they must traverse it inch by inch, in successive periods of time.

In the last paragraph of page 13 and upon following pages of their brief, counsel assert that the court below based its view upon "a total misapprehension of the terms employed in" regulation 267. "The true interpretation of this regulation," they say, (p. 14,) "depends upon the proper construction of the term 'service.'" They then go on to declare that the word signifies the trips made, regardless of their *length*, or of the *time* in which they are to be accomplished; and, therefore, that "increase of service" means a greater number of trips and not an additional distance. They quote no sections from the Postal Code to sustain this exposition; probably feeling confident that this court will carefully peruse that entertaining work to become satisfied of the truth of this statement; or else will take their word for it. It is quite significant that they prefer assertion to citation. We have not time nor occasion to search the code, but, from those parts that have come under our notice in the preparation of this argument, we should say that "service" there means just what it does in ordinary conversation, except that it is to be rendered in conveying the mails; and is increased, diminished, or varied, either by carrying them more or less frequently than at first agreed, or in transporting them beyond the original terminus, or leaving them short of it.

We cannot take leave of the plaintiff's brief without noticing that it contains those ebullitions of ill-temper which are generally found to spring from a consciousness of being in the wrong. They criticise harshly the official action of the constituted authorities. One example is found near the top of the 18th page, where they speak of the "after thought of the then Attorney-General, who *took the trouble* to advise the [Post-Office] De-

partment in a second opinion that its action in following the uniform construction and practice of thirty years, and awarding a contract was in violation of law. Apparently convinced that the advertisement standing alone was valid, and that the schedule applied to the route from either point, *the Court of Claims were constrained to bring in the two hundred and sixty-seventh regulation*, to give a different and adverse construction to the language of the advertisement itself." In an oral argument we doubt if it would have been thought prudent to venture upon these expressions. We see nothing in the course of the Attorney-General or of the Court of Claims that justifies them. Each was acting under the sanction of official oaths and the weight of official responsibilities, knowing that their respective opinions were to be placed permanently upon record, to be read by lawyers, and tested by this high tribunal. Why, then, should they be accused of disregarding these considerations in order to pervert judgment and deprive this claimant of his dues? Probably when the fiat of this court disposes of his case, he will say that the supreme judges were party to the conspiracy to defraud him of his rights.

This regulation, sec. 267, we have shown to be essential to the proper determination of the fact, who is the lowest bidder. All the high functionaries who have dealt with this matter have applied to it this rule, because it is only by observing these rules that the vast business of the Department can be properly conducted.

Mr. Justice Wayne, in giving the opinion of this court in United States *vs.* Roberts, (9 Howard, 517,) said:--

"There cannot be either security or efficiency in the business of the Post-Office Department, unless its re-

ceipts and disbursements are made upon a fixed plan. It must be executed, too, with *uniformity* and *rigor*. The duty of its officers must be *definitely prescribed* and *enforced without relaxation*. Nor will there be either safety or justice for the country if the *forms* enjoined for receiving and paying money are permitted to be disregarded by its deputies. The establishment under our system must be made to support itself. It is extended from day to day into Territories, late wildernesses, and from place to place in and beyond them, through prairies, swamps, and marshes, without any other trail than those of the first wheels that passed over them. In the settled parts of the country, new routes, changes of routes, increase of speed in conveyances, and new conveyances, are daily demanded to meet the conveniences and the wants of our almost incalculable internal commerce. Neither the cost of them nor the revenue can be anticipated. Sleepless vigilance in its chief, sleepless devotion to its business, aided by the unremitting industry and intelligence of his assistants in the Department, can only meet their responsibility, as that is estimated by public expectation.

"Such is the conviction of every one who has ever had any connection with the Department, or of any one who has looked into its operations as a point of liberal inquiry. *Its deputies and agents, in every branch of its business, see and feel the necessity of conformity to the rules prescribing their separate duties.* Postmasters in the most limited offices, and contractors for the smaller or larger routes have found that their best security for the preservation of their relations to each other and to the Department is a *strict compliance with its instructions.*" (19 Howard, 517, 518.)

There were some other questions and suggestions, of secondary importance, which it was my original purpose to present, but the great length to which this discussion has extended leads me to abandon it, and submit the cause.

Should the court, by any possibility, come to the question of damages, I would say that the finding of the court below that these were $15,000 a year, upon a contract for $26,000, was erroneous, in view of the right of the Postmaster-General, under the Postal Regulations, 194, § 263, to "discontinue or curtail the service, in *whole* or in part, * * * allowing as a full indemnity to the contractor, one month's extra pay." This provision is made part of every mail-contract, so that if Mr. Garfielde was entitled to any contract, it was one subject to this contingency, which would be the utmost limit of his damage, had he shown himself entitled to recover anything.

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